

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 2016 OF 2021

Mariyayi Macchimaar Sahkari Sanstha Maryadit,)
Having its Registration No.)
T.N.A/R.S.R/324/2001/03.01.2001 S.T.N.,)
Through its President,)
Mr. Harishchandra Rajaram Sutar, aged 60 years,)
& having its office at Plot No. 189, Vashigaon,)
Navi Mumbai – 400 703)... **Petitioner**

Versus

1. Department of Fisheries, Maharashtra)
Through the Commissioner of Fisheries,)
& having its office at Taraporevala Aquarium,)
Netaji Subhash Roah, Charni Road,)
Mumbai – 400 002)

2. Assistant Commissioner of Fisheries, Thane-Palghar,)
Department of Fisheries, State of Maharashtra,)
& having its office at Kuldeep Arcade, 1st Floor,)
Nr. Nawli Railway Crossing,)
Lokmanya Nagar, Palghar (W))

3. Revenue and Forest Department,)

State of Maharashtra,)
Through its Principal Secretary (Revenue),)
And through its Secretary (Forests),)
Having their offices at Mantralaya,)
Mumbai – 400 032)

4.Additional Principal Chief Conservator of Forests)
(Mangrove Cell), Forest Department,)
State of Maharashtra & having its office at)
302, Wakefield House, 3rd Floor, Bellard Estate,)
Above Britannia & Co. Restaurant,)
Fort, Mumbai – 400 001)
Email ID: ccfmmumbai@gmail.com)

5.Maharashtra Coastal Zone Management Authority,)
Through its Chairman, & having its office at)
Environment Department, Room No 217, Mantralaya)
Mumbai, Maharashtra – 400 032)

6.Environment Department, State of Maharashtra,)
Through its Principal Secretary,)
& having its office at Room No. 217 (Annexe),)
Mantralaya, Mumbai – 400 032)

7.District Collector, Thane District,)
Office of District Collector,)
First Floor Collector's Office, Court Naka,)

Thane West – 400 601)

8.Maharashtra State Road Development Corporation Ltd.)

(MSRDC), Through its Managing Director,)

And having its office at Nepean Sea Road,)

Priyadarshini Park, Mumbai – 400 036)

9.Chief Secretary, State of Maharashtra,)

Having its office at Mantralaya, Mumbai – 400 032)

10.Urban Development Department,)

State of Maharashtra, Through its Secretary & having)

its office at Mantralaya, Mumbai – 400 032)... **Respondents**

Appearances :

Mr.Zaman Ali for the Petitioner.

Mr. Sharan Jagtiani, Senior Advocate appointed as ‘Amicus Curiae’ along with Mr.

Aditya Pimple, Mr. Rohil Bandekar, Mr. Siddharth Joshi, Advocates.

Ms. Sharmila Deshmukh for Respondent No. 5 (MCZMA).

Mr. A. I. Patel a/w Ms. M. P. Thakur, AGP for Respondent No. 1 – State.

Mr. Saket Mone and Mr. Subit Chakrabarti i/b Vidhi Partners for Respondent No. 8

(MSRDC)

**CORAM : S.J. KATHAWALLA &
MILIND JADHAV, JJ.**

RESERVED ON: 16TH JULY, 2021

PRONOUNCED ON: 12TH AUGUST 2021

JUDGMENT: (Per S.J. Kathawalla & Milind Jadhav, JJ.) :

INDEX

FACTUAL BACKGROUND.....06

**APPOINTMENT OF THE AMICUS CURIAE AND THE HEARING OF 3RD
JULY, 202108**

ISSUES FOR DETERMINATION09

**SUBMISSIONS OF THE PARTIES ON ISSUE (i) : Whether the Petitioner can
prove that the Project Affected Fishermen have a customary right to fish for a living in
Thane Creek ?.....10**

Petitioner10

Respondent No. 8 and Respondent Nos. 1 and 210

Amicus Curiae.....11

**SUBMISSIONS ON ISSUE (ii) – Whether TCB III is likely to detrimentally affect
the practice of customary rights ?.....14**

Petitioner14

Respondent No. 8.....15

Respondent Nos. 1 and 2	15
Amicus Curiae.....	16
SUBMISSIONS ON ISSUE (iii) : Whether a state-wide policy for all categories of persons whose customary rights are affected by infrastructure projects is required ? If yes, what is the framework for such a policy that can be recommended to the appropriate authorities ?.....	17
Petitioner	17
Respondent No. 8.....	17
Amicus Curiae.....	18
FINDING ON ISSUE (i).....	20
FINDING ON ISSUE (ii)	37
FINDING ON ISSUE (iii).....	40
FACTORS AND CRITERIA FOR FORMULATING A COMPREHENSIVE COMPENSATION POLICY.....	41
FINDINGS ON ISSUE (iv)	52
CONCLUSION	54

FACTUAL BACKGROUND :

1. The Petitioner is a society registered under the Maharashtra Cooperative Societies Act, 1960. The Petitioner states that it comprises of members from the traditional fishermen community known as Koli community, from Koliwadadas such as Vashigaon, Juhugaon, Koparkhairane, Ghansoli, and Diva (“**Project Affected Fishermen**”). The Petitioner states that it was formed in 2001, and is actively engaged in raising welfare concerns on behalf of fishermen from Koliwadadas located in and around Thane Creek.

2. Respondent No. 1 is the Department of Fisheries of the State of Maharashtra, which is responsible for development of fisheries, welfare of fishermen, fisheries surveys and statistics, etc. Respondent No. 2 is the Assistant Commissioner of Fisheries of the Thane-Palghar Region, who is responsible for carrying out the functions of Respondent No. 1 in the Thane-Palghar area. Respondent No. 8 is the Maharashtra State Road Development Corporation (MSRDC), the project proponent for the Thane Creek Bridge III project (“**TCB III**”).

3. TCB III is a proposed six-lane bridge on the Sion-Panvel Highway. It is being constructed as an addition to the existing Thane Creek Bridge, near Vashi, Maharashtra. The Thane Creek Bridge is built across Thane Creek, connecting the city of Mumbai to the main land at Navi Mumbai. It is one of the four entry points into Mumbai, the other three being the Airoli Bridge, Mulund Check Naka and Dahisar Check Naka. According to Respondent No.8, Thane Creek Bridge I (“**TCB I**”) was

constructed in 1973 and Thane Creek Bridge II (“TCB II”) was built and opened to traffic in 1997. A pictorial representation of TCB III annexed by Respondent No. 8 in its Affidavit in Reply is reproduced below.



4. The Petitioner states that the Project Affected Fishermen are inhabitants of Thane Creek, and exercise their customary right to fish for a living in Thane Creek. It states that construction of TCB will adversely affect their right to fish.

5. This Petition therefore seeks a direction against the Respondents to provide appropriate compensation to the Project Affected Fishermen for loss of mangroves, mudflats and creeklets on account of construction of TCB III, all of which qualitatively and quantitatively impact on their means of livelihood through fishing; and a direction against the Respondents to frame a compensation scheme to protect socio-ecological interests of traditional fishermen in the State of Maharashtra on account of reclamation/damage/destruction of fishing areas for infrastructure projects.

APPOINTMENT OF THE AMICUS CURIAE AND THE HEARING OF 3RD JULY, 2021 :

6. The Petition was first listed before this Court on 22 June 2021. On this date, the Court appointed Mr. Sharan Jagtiani, Senior Advocate, as Amicus Curiae, to assist the Court in relation to this Petition.

7. The matter was next listed before this Court on 3 July 2021. The learned Amicus Curiae addressed the Court at some length regarding the issues raised in the Petition. He submitted that according to him, *prima facie*, there was no case made out by the Petitioner for the requirement of a mandatory NOC from Respondent No.1. He submitted that if the Petitioner is able to prove that the Project Affected Fishermen have a customary right to fish for a living in Thane Creek, which is being impacted by TCB III, then they should be entitled to compensation. He submitted that the material disclosed does seem to establish a customary right of the Project Affected Fishermen

and that the TCB III is likely to affect this right. He further submitted that even as to the larger issue of a policy framework, it may be necessary to frame a state-wide policy for compensation of project affected persons whose customary rights are likely to be detrimentally impacted by infrastructure projects.

8. The Advocate for Respondent No. 8 submitted that it had no objection with a state-wide compensation policy being implemented for project affected persons, but that TCB III ought not to be stalled on the basis of the Petitioner's contention that an NOC from the Fisheries Department was required before commencement of the project.

9. The Advocate for the Petitioner submitted that he was not pressing the prayer which sought to restrain Respondent No. 8 from commencing the project until an NOC from Respondent No.1 is obtained.

10. In light of the various submissions, the aspect of requirement of NOC from the Department of Fisheries was no longer in issue in this Petition.

11. The scope of the Petition was therefore narrowed to a determination of the following issues.

ISSUES FOR DETERMINATION :

- (i) Whether the Petitioner can prove that the Project Affected Fishermen (as defined in paragraph 1) have a customary right to fish for a living in Thane Creek?
- (ii) Whether TCB III is likely to detrimentally impact the practice of such customary rights?

(iii) Whether a state-wide policy for all categories of persons whose customary rights are affected by infrastructure projects is required? If yes, what is the framework for such a policy that can be recommended to the appropriate authorities?

(iv) If the answer to Issue (i), Issue (ii) and Issue (iii) is yes, what should be the contours of a policy compensating those affected by TCB III?

SUBMISSIONS OF THE PARTIES ON ISSUE (i): Whether the Petitioner can prove that the Project Affected Fishermen have a customary right to fish for a living in Thane Creek?

Petitioner :

12. Shri Zaman Ali, Learned Counsel for the Petitioner:

i. Submitted that the Project Affected Fishermen are the original inhabitants of Thane District. Fishing has been their ancient occupation since time immemorial, and they have depended on coastal ecosystems in Thane Creek to practice this occupation as a means of earning a livelihood.

ii. Placed reliance on various documents to prove that the Project Affected Fishermen have customary rights to fish for a living in Thane Creek. An example of one of these documents includes an ethnographic survey commissioned by the erstwhile Government of Bombay titled “Tribes and Castes of Bombay – Vol. 2” by R. E. Enthoven. We have dealt with these documents at length in our findings.

Respondent No. 8 and Respondent Nos. 1 and 2 :

13. Shri Saket Mone for Respondent No. 8 submitted that Respondent No. 8

has no objection to framing of a policy in this case, and that the policy may determine who pays the compensation.

14. Similarly, Shri A. I. Patel for Respondent Nos. 1 and 2 (the State) submitted that the State has no objection to the framing of a policy for TCB III, but that he would need to take instructions with regards to a state-wide policy framework.

15. However, neither of these Respondents made any submissions on whether the Project Affected Fishermen have customary rights to fish for a living in the Thane Creek, nor was this Petition opposed or contested by them.

Amicus Curiae :

16. Shri Sharan Jagtiani, Ld. Senior Counsel appointed as Amicus Curiae submitted:

i. That to answer the first issue requires a determination of whether the fishing activity practiced by the Project Affected Fishermen in the Thane Creek is a custom, thereby vesting in them a customary right to fish for a living.

ii. He relied on various judgments which expound the criteria that need to be met to prove that a custom exists, namely *Ramkanya Bai & Anr. v Jagdish & Ors.*,¹ *Lakshmidhar Misra & Ors. vs. Rangalal & Ors.*,² *Municipal Corporation of Greater Bombay & Anr. vs. Vasudeo Shivram Worlikar & Ors.*,³ and *Alexkor Ltd & Anr. v The Richtersveld Community & Ors.*⁴

1 (2011) 7 SCC 452, Para 31.

2 1949 SCC Online PC 44, Pg. 277.

3 (2004) 5 Bom CR 99, Pg. 7.

4 Case CCT 19/03, Constitutional Court of South Africa.

iii. He also relied on judgments in which fishing was held to be a customary right. These include a judgment of the Supreme Court of Appeal of South Africa in *Malibongwe David Gongqose & Ors. v Ministry of Agriculture & Ors.*⁵ and a judgment of the National Green Tribunal, Pune, in *Ramdas Janardan Koli v Secretary, MoEF & Ors.*⁶

iv. Additionally, he submitted that the Project Affected Fishermen's right to fish in the Thane Creek may also be in the nature of a customary easement under Section 18 of the Indian Easements Act, 1882, or *profits a prendre* under common law, and relied on the decision in the case of *State of Bihar & Ors. vs. Dalmia Jain & Co. Ltd.*⁷ to substantiate these submissions.

v. Further, it was submitted that the Court would need to analyze the documents on record in these proceedings against the touchstone of the principles governing customary rights which have been enunciated in various court decisions, to arrive at a finding of whether the Project Affected Persons have a customary right to fish for a living in Thane Creek.

vi. A table titled "The Petitioner's Material to show the Ecological Sensitivity of the Thane Creek & their Customary Fishing Rights," which compiled the documents relevant to this determination was tendered by the Ld. Amicus Curiae. The table is reproduced below for convenience.

5 Case No: 1340/2016, Supreme Court of Appeal of South Africa.

6 Application No. 19/2013 before the NGT, (Wester Zone) Bench, Pune.

7 (1968) 1 SCR 313.

Sr.No.	TITLE	REFERENCE
1.	Notification of the Maharashtra Revenue & Forests Department notifying the Thane Creek Flamingo Sanctuary	Exhibit B, page 62 @ pages 62, 63
2.	Marine Fisheries Census 2010, Maharashtra	Exhibit C, page 65 @ page 66
3.	Maharashtra Revenue & Forests Department Letter dated 15.06. 2019 recognizing the five Petitioner Koliwadas	Exhibit D, page 67 @ page 67
4.	The Constitution (Scheduled Tribes) Order, 1950 notifying the Koli Community as Scheduled Tribes	Exhibit E, page 68 @ page 70
5.	Ethnographical Study dated 1922 commissioned by the erstwhile Government of Bombay	Exhibit F, page 72 @ pages 73, 76, 77, 79
6.	Photographs of fishing at the Thane Creek	Exhibit H, page 84 @ pages 84 - 95
7.	Chief Conservator of Forests, Maharashtra, approval for the Thane Creek Bridge Project	Exhibit I, page 109 @ pages 109, 110
8.	Minutes of the Maharashtra Coastal Zone Management Authority's meeting dated 2nd and 3rd November 2016	Exhibit I, page 112 @ pages 113, 114
9.	New Bombay Development Plan	Exhibit J, page 115 @ page 115
10.	Commissioner of Fisheries' Communication dated 02.07.2012 to various authorities	Exhibit K, page 118 @ pages 118, 119
11.	Department of Fisheries' Response to the Petitioner's RTI Application	Exhibit M, page 122 @ pages 122
12.	The SAFCON Preliminary Report on the Biodiversity of the Thane Creek	Exhibit N, page 124 @ pages 125,126,129
13.	Maharashtra Forest Department's Thane Creek	Exhibit O, page 138 @

	Flamingo Sanctuary Management Plan 2020 to 2030	pages 146, 147, 150, 152 , 153, 156
14.	Mumbai Trans Harbour Link Fisherfolks Compensation Policy	Exhibit Q, page 170 @ pages 170 to 178, 185 to 191

17. All these submissions of the Amicus Curiae were captured and elaborated upon by him in a Note and Compilation he tendered to the court on the hearing held on 16 July 2021.

SUBMISSIONS ON ISSUE (ii) – Whether TCB III is likely to detrimentally affect the practice of customary rights?

Petitioner :

18. Shri Zaman Ali, Learned Counsel for the Petitioner submitted :

i. That Thane Creek consists of extensive mudflats along its banks, which are characterized by growth of mangroves. Due to the large-scale availability of intertidal lands such as mudflats and mangroves, Thane Creek provides excellent catch of commercial fish and crustaceans. In fact, due to the rich ecosystem and biodiversity of Thane Creek, it was declared as “Thane Creek Flamingo Sanctuary” in 2015.

ii. That TCB III falls within the Ecologically Sensitive Zone of the Thane Creek Flamingo Sanctuary. TCB III will affect 1.4 hectares of mangrove forest and additionally affect 6.76 hectares of CRZ-I and CRZ-IV areas comprising of fishing areas and mudflats.

iii. That construction of TCB III will involve heavy concretization and

reclamation of land which has been inhabited by the Project Affected Fishermen for several decades.

iv. That in addition to the destruction of mangroves, mudflats etc., the Project Affected Fishermen's customary right to fish will be impacted by blocked access to fishing routes and navigational channels for fishing activities.

Respondent No. 8 :

19. Respondent No. 8 has in its Affidavit not denied the possible impact that TCB III will have during the construction phase and thereafter, on the mangroves, biodiversity, fish catch etc.

20. However, Respondent No. 8 submitted that the navigational channels for fishing activities will not be impacted, as TCB III is only in the nature of expansion of TCB II. It is planned parallel to the existing TCB I and TCB II and is sandwiched between TCB II and the railway bridge next to it. For this reason, Respondent No.8 submits that the addition of TCB III will have no material effect on the navigational channels.

Respondent Nos. 1 and 2 :

21. Shri Patel for Respondent Nos. 1 and 2 submitted that TCB III is likely to impact the fisheries and livelihood of the Project Affected Fishermen, because, during the construction period, movement in the inter-tidal fishing areas will be curtailed and mangroves, mudflats, and creeklets in Thane Creek will to some extent be destroyed.

Amicus Curiae :

22. Shri Sharan Jagtiani, Ld. Senior Advocate appointed as Amicus Curiae submitted:

i. That there can be various impacts on the Project Affected Fishermen's customary rights which can be categorized under different heads. These include direct losses, indirect losses, permanent and temporary losses etc. Such a classification can be useful for determining the types of impacts TCB III can have.

ii. The navigational channels that the Project Affected Fishermen use may be blocked during the construction phase of TCB III.

iii. He emphasized that the livelihood of fishermen is dependent on a healthy environment and balanced ecology, stating that any development activity must be undertaken in a sustainable manner to avoid upsetting the ecological balance. He made reference to the Preamble of the Coastal Regulation Zone (CRZ) Notification, 2011,⁸ which recognizes this interconnectedness.

iv. TCB III will upset the ecological balance in Thane Creek, due to the destruction of approximately 1.4 hectares of mangroves. Mangroves play a vital role in maintaining ecological balance and sustaining biodiversity. The destruction of mangroves often results, *inter alia*, in loss of biodiversity, and reduced fish catch, which in turn would impact livelihood of the Project Affected Fishermen. He relied on a judgment of this Court in *Bombay Environmental Action Group & Anr. v State of*

⁸ Coastal Regulation Zone Notification dated 6 January 2011

*Maharashtra & Ors.*⁹ to substantiate this point.

SUBMISSIONS ON ISSUE (iii): Whether a state-wide policy for all categories of persons whose customary rights are affected by infrastructure projects is required? If yes, what is the framework for such a policy that can be recommended to the appropriate authorities ?

Petitioner :

23. Shri Zaman Ali, Learned Counsel for the Petitioner contends that owing to the impact of TCB III on their livelihood, the Project Affected Fishermen are entitled to be compensated. He submits that there is no state-wide compensation policy for fishermen whose livelihood is impacted due to proposed projects along the coast, sea or creek in Maharashtra. This is despite state agencies themselves acknowledging this lapse while framing the Fisherfolk Compensation Policy for the Mumbai Trans Harbour Sea Link Project (“**MTHL Project**”). Therefore, a state-wide compensation policy is the need of the hour. The MTHL Project is similar to TCB III. It is proposed to be a 21.8km sea link that connects Sewri on the Mumbai side to Chirle on the Navi Mumbai side.

Respondent No. 8 :

24. Shri Saket Mone, Learned Advocate for Respondent No. 8 has submitted that Respondent No. 8 is open to the need for a fishermen compensation policy for infrastructure projects along the coastline of Mumbai and Maharashtra and

is willing to assist the State Government in framing a uniform policy document on compensation to be paid to fishermen. However, he expressed concern over the manner in which the compensation as determined would be paid to the Project Affected Fishermen in this case.

Amicus Curiae :

25. Shri Sharan Jagtiani, Learned Senior Advocate, submitted:

- i. That there is a need for a state-wide compensation policy for *any* community or class of persons whose customary rights to practice a livelihood are adversely impacted by an infrastructure project.
- ii. That there are various instances of legislations, orders, or policies propounded by State Governments or the Central Government to compensate communities affected by infrastructure projects. Such efforts are not restricted to fishing communities, but extend to communities practicing other vocations to earn a livelihood too.
- iii. In 1922, the Government of Bombay enacted the Mahul Creek (Extinguishment of Rights) Act. A new oil pipe line to the oil pier at Trombay had to be built, and for this purpose, access to a portion of the sea from Mahul Creek was permanently closed. Keeping in mind that a number of persons would be affected by this, the government awarded compensation for loss or damage caused to any person by virtue of extinction of their rights to access the sea. Compensation was to be made in the manner that was contemplated under Section 7 of the Land Acquisition Act,

1894 when an acquisition of land is made.

iv. Similarly, the Government of Maharashtra made an effort to compensate the fisherfolk for loss of livelihood that was caused by the construction of the Mumbai Trans Harbour Link Project, called the Mumbai Trans Harbour Link Fisherfolk's Compensation Policy.

v. The efforts of the Government of Maharashtra to compensate fishing communities is similar, in principle, to the general efforts made even by the Government of India, to recognise customary rights of local forest dwellers and ensure that compensation has been paid to them due to their displacement owing to state development intervention. These rights are crystallized in *The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006*.

vi. It is therefore clear that the governments at national and state level have paid a keen attention to the customary rights of communities that include not only fishing communities, but also other vocations and occupations.

vii. Reference may also be made to The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. Section 4 of this Act mandates a Social Impact Assessment to be conducted before any land is acquired for a public purpose.

viii. All of these therefore indicate a clear intent on the part of the State and Union Governments to holistically consider the impact of economic activity on people beyond just the physical deprivation of land.

ix. It was accordingly submitted that the State Government should adopt a state-wide policy framework which will provide it with direction when dealing with issues of violations of customary rights. He tendered a Note titled ‘Factors and Criteria for Formulating a Comprehensive Compensation Policy,’ with suggestions on such a state-wide policy.

FINDING ON ISSUE (i) :

26. The first step to answer this issue is to analyze what exactly comprises a custom, including whether fishing has ever been held by courts to be a customary right. The next step would be to determine if the material on record meets the requirements to prove that a customary right to fish for a livelihood exists.

A. General Principles Relating to Customary Rights

27. Article 13 (3) of the Constitution of India recognizes custom or usage as having force of law.

“Art.13 (3) In this article, unless the context otherwise requires,—

(a) “law” includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law...”

28. In *Ramkanya Bai & Anr. v Jagdish & Ors.* (supra), the Supreme Court, while dealing with the question of whether a civil court can hear a suit in regard to violation of a customary easement, laid down the requisites of a custom. In this

context, it observed that:

“31. To establish a custom, the plaintiff will have to show that (a) the usage is ancient or from time immemorial; (b) the usage is regular and continuous; (c) the usage is certain and not varied; and (d) the usage is reasonable...”

29. In *Lakshmidhar Misra & Ors. vs. Rangalal & Ors.* (supra), the Judicial Committee of the Privy Council, in an appeal from the High Court at Patna, was concerned with whether there was a village custom that a certain parcel of land was to be used as a cremation ground. In this context, the court threw light upon the meaning of a custom, and giving instances of accepted examples of customary rights, stated that:

*“In their Lordships’ view the true legal basis of such rights lies in custom. This is as much the case in India as it would be in England. Indeed this is the view which is fully set out in the judgment of Mr. Justice B.K. Mukherjea in *Asrabulla v. Kiamatulla* [AIR 1937 Cal. 944]. A customary right can exist only in relation to the inhabitants of a District and it cannot be claimed in respect of the public at large [Fitch v. Rawling [2 H.B.I. 808]]. The custom, if established, makes the local law of the District and it creates a right in each of the inhabitants irrespective of his estate or interest in any particular property. The Courts of England have upheld many customs in different parts of the countryside which have had the effect of binding some piece of land to the perpetual service of the village or District. The claims so upheld are not different in any essential respect from the claim to the cremation ground in the village of Byree which*

is in question here. A custom for the inhabitants to dance upon a piece of ground for their recreation [Abbot v. Weekly [1 Levins 176.]]; a custom to use a close for exercise and play at all kinds of lawful games, sports and pastimes [Fitch v. Rawling [2 H.B.I. 808]]; a custom to enter upon certain land, erect a maypole thereon and dance round and about it [Hall v. Nottingham [1 Ex. D. 1]]. What the Courts have required of a custom, if the law is to uphold it as a right, is that it should be immemorial in origin, certain and reasonable in nature and continuous in use. It is by these tests that the appellants' claim in this case must be tried."

[Emphasis Supplied].

30. In ***Municipal Corporation of Greater Bombay & Anr. vs. Vasudeo Shivram Worlikar & Ors.*** (supra), a suit was filed claiming rights in respect of a parcel of land. The villagers practiced fishing. The land was claimed to have been used since time immemorial for drying fishing nets, grazing cattle, and for purposes of the fishing trade. The Learned Single Judge held that even though the fishermen were not owners of the land, they had a customary right over the land for drying fish. The said decision of the Learned Single Judge was affirmed by the Hon'ble Division Bench of the Bombay High Court. The relevant paragraphs state :

"1. The present two appeals are filed against the common judgment delivered by the learned Single Judge dated 2-9-1994 in Suit No. 422 of 1973 by which the learned Judge has partly decreed the suit by holding that the plaintiff and other villagers of Koliwada Village have all the rights and

privileges in respect of Waras Land in terms of the resolution of 1933 of the Bombay Improvement Trust Committee.

2. The suit was filed by four of the villagers in their representative capacity claiming right in respect of the area of about 103650 sq. yards equivalent to 83000 sq. mts. The villagers are carrying on business of fishing. They are permanent tenants of their holdings in that village subject to payment of Fazandhari rent to the Fazandhars. The Waras land which is the subject-matter of the present appeals is appurtenant to the village land and is meant for beneficial enjoyment of the activities associated with fishing on the said land. The basic use to which the said land is put to is drying their fishing nets, grazing their cattle and for their fishing trade purposes. This user of the said land is from time immemorial. The said rights have been used and in existence in favour of the villagers even before the present appellant was constituted and/or their predecessor in title.

7. The Corporation resisted the suit by filing the written statement, inter alia, contending that the respondents were the owners in respect of the said land under the acquisition.

9. However, it is further contended that on acquisition of the land, rights in the land had been acquired and the Corporation has become owner in respect of the said land. It is thus contended that the plaintiff villagers have no right whatsoever. It was also contended that once the land is acquired, no right remains in favour of the villagers-plaintiffs. It has been further contended that under the

resolution all the villagers have failed to return the compensation already received by them under the Land Acquisition Act and, therefore, the said resolution of 1933 is of no legal effect and no right flows in favour of the villagers in the present case.

11. The learned Single Judge while considering the aforesaid issues has given the finding that under the resolution of 1933 the acquisition which was effected by the Bombay Improvement Trust was withdrawn and the status quo ante has been established and the rights of the villagers-plaintiffs towards the said Waras land which is the customary right enjoyed by the villagers or the fishermen is returned back to the villagers. The learned Single Judge has further held that though the plaintiffs-villagers are not the owners in respect of the said land they have customary and/or easementary right to the said land for the purpose of user of the said land for drying fish as fishermen...

15. In the present case the learned Judge having relied upon the said judgment of the Madras High Court and evidence before him has come to the conclusion that there is such customary right existing in favour of such villagers... The learned Single Judge has considered the evidence and material before him and after going through the said material and the evidence before him, has come to the conclusion that such customary and easementary right exists in favour of the villagers and has been recognized by the predecessor in title of the Defendant Corporation i.e. Bombay Improvement Trust Committee and the same is also recognised in law as well.

17. In the aforesaid circumstances, we do not find any merit

in the present appeal preferred by the Bombay Municipal Corporation and the same is accordingly rejected. Insofar as the appeal preferred by the villagers is concerned, the learned counsel Mr. Kotwal appearing on behalf of the said villagers submits that in light of the dismissal of the appeal of the Bombay Municipal Corporation, he is not desirous of pressing the same and the same is accordingly dismissed as not pressed. There shall be no order as to costs.”

31. The judgment of *Alexkor Ltd. v. The Richtersveld Community & Ors.* (supra), of the Constitutional Court of South Africa, is also very instructive on this aspect. In *Alexkor*, the issue before the court, *inter alia*, was with regards to the nature of the rights in certain land, of a community that had inhabited it for over a century. The community argued that it held a “customary law interest” in the land. The Constitution of South Africa made it obligatory for the Courts to apply customary law where applicable. Upon examining the evidence presented to sustain the claim that the community had a customary law interest, the court held that:

“59. On this issue, the LCC similarly found that the Richtersveld Community “considered the Richtersveld to be their land, held by them in common.” These findings are supported by evidence and we accept them.

60. The content of the land rights held by the community must be determined by reference to the history and usages of the community of Richtersveld. The undisputed evidence shows a history of prospecting minerals by the Community and conduct that is consistent only with

ownership of the minerals being vested in the Community.”

32. All the cases discussed so far deal with customary rights generally. In addition, there is also judicial precedent of cases where it was specifically held that fishermen have a customary right to fish for a living. These are discussed below.

B. The Customary Right to Fish for a Living

33. In the case of *Malibongwe David Gongqose & Ors. v Ministry of Agriculture & Ors.*, (supra) the Supreme Court of Appeal of South Africa considered an issue relating to customary rights of fishing for a livelihood. A local community claimed to have customary rights to fish in certain waters. A subsequent statutory enactment stated that no fishing could be conducted in those same waters. Upon an appreciation of the evidence in the case, the Court held that “[t]he appellants accordingly proved that since time immemorial, the Dwesa-Cwebe communities, of which they are part, have a tradition of utilising marine and terrestrial natural resources. It is thus not surprising that the Magistrate found that the evidence established the existence of a customary right to fish within the relevant coastal waters by the Dwesa-Cwebe communities.” On the point of whether the statute extinguished the customary rights, the court held that such extinguishment happens only upon a clear and justified extinguishment of customary rights, which the statute did not do.

The court relied on decisions from Australia, Canada in arriving at this decision.

34. *Malibongwe David Gongqose* (supra) is particularly instructive for the importance that it attributes to customary rights. The Court observed in the very first paragraph that “*customary law [has] not occupied its rightful place in this country.*” Such an observation might well be made in the Indian context too. Further, *Malibongwe David Gongqose* (supra) reiterates the principle that “*customary rights and conservation can co-exist*” and of the important role that traditional communities play in conserving the environment. It observes that:

“56. *These purposes are consistent with the continued existence of customary rights of access to and use of marine resources, and their conservation, by the Dwesa-Cwebe communities since time immemorial. These rights and practices were extant long before the MLRA came into force in September 1998 and are subject to significant regulation by customary law. Customary rights and conservation can co-exist. And it is important to remember that as regards conservation and long-term sustainable utilisation of marine resources in the MPA, the Dwesa-Cwebe communities have a greater interest in marine resources associated with their traditions and customs, than any other people. These customs recognise the need to sustain the resources that the sea provides. For these reasons, and more particularly, that the customary law of the Dwesa-Cwebe communities provides for sustainable conservation and utilisation of resources, the high court’s finding that by concluding the restoration agreement, the*

communities had accepted 'that they would access the sea in accordance with the dictates of the law giving expression to the concept of sustainable development', is insupportable."

35. The decision of the National Green Tribunal (NGT), Pune in *Ramdas Janardan Koli v Secretary, MoEF & Ors.*, (supra) is another instructive case directly relevant to this discussion. The Applicants in the case were traditional fishermen from Koliwadadas in the Raigad District of Maharashtra. They sought compensation for loss of livelihood caused by the project activities of the Respondents. The important details of the case are discussed below.

i. The project in question was the extension of a port operated by the Jawaharlal Nehru Port Trust (JNPT). For this project, the project proponent sought to reclaim land, and cause the removal of mangroves. The port is located in Nhava Creek, where the fishermen exercised their right to fish (paragraph 8). It was the case of the Applicant that these activities were impairing the regular tidal water exchanges, egress and ingress of fishermen's boats to the sea area through the creek at JNPT.

ii. At the beginning of the findings, the NGT recorded, in paragraph 22. that there was no dispute that

"...Since immemorial time, the families of the traditional fishermen residing at... are dependent upon traditional business of fishing... This business is still ongoing at various places of the coastal stretches, not only in the

outskirts of Mumbai, but at places like Konkan, Goa, Kerala, so on and so forth. Needless to say, business of fishery is recognised as source of livelihood for a class of community like the Applicants...”

(Emphasis Supplied)

iii. The Applicant cited the Mahul Creek (Extinguishment of Rights) Act, 1922 as the basis in law for their claim for compensation (paragraph 10). This Act countenanced the payment of compensation for extinguishment of rights in the same manner as provided for in Section 7 of the Land Acquisition Act, 1894. But the Tribunal stated that the Mahul Creek Act, 1922 was not applicable to the creek at Nhava-Sheva.

iv. In the absence of a specific enactment, the NGT, in paragraph 40, held that the fisherman’s right to fish in the creek can also be traced to customary law, and in any case the right of fishing is in fact recognized in Section 18 of the Indian Easements Act, 1882 which deals with customary easements.

v. The NGT, in paragraph 53, accepted that “... *The recognition of rights by the Committee, as well as immemorial fishing activities of the Applicants give them not only customary rights to use the sea water for continuation of fishing rights, but also to continue the right to life and liberty under the Constitution... They cannot be deprived of bread and butter for no much fault on their part.*”

vi. It ordered payment of compensation by JNPT to the Applicants

(paragraph 68).

36. The facts of the case in this Petition are similar to the facts of the case before the NGT in *Ramdas Janardan* (supra). There are traditional fishing communities claiming customary rights to fish on certain public lands; there is an infrastructure project slated to be carried out in the proximity of the waters where the fishermen fish; the construction work is likely to cause permanent and temporary damage to the marine ecosystem abutting the proposed project; as a result of such destruction, the fishermen community – who rely on fishing as a means of livelihood – are claiming that their livelihood will be directly and adversely affected. The NGT in *Ramdas Janardan* (supra) accepted the case of the fishing community, and ordered that they be paid compensation.

37. Although we are not bound by the decision of the NGT, it is undoubtedly relevant and of assistance in supporting our approach and conclusion that if the Petitioner is able to establish that the Project Affected Fishermen have a customary right to fish for a living in the Thane Creek, which is adversely affected by TCB III, then compensation to such Project Affected Persons must follow.

Indian Easements Act, 1882 :

38. While the analysis thus far has focused on “customary rights,” which is based on common law, there is also statutory recognition of such customs that might entitle the Petitioner to compensation. This is found in the Indian Easements Act, 1882, under Section 18, which deals with “customary easements.” Section 18 states

that:

“18. An easement may be derived from a local custom.

Such easements are called customary easements.

Illustration (a): By the custom of a certain village every cultivator of village land is entitled, as such, to graze his cattle on the common pasture. A having become the tenant of a plot of uncultivated land in the village breaks up and cultivates the plot. He thereby acquires an easement to graze his cattle in accordance with the custom...”

39. An easement is a right which the owner of a parcel of land (dominant heritage) possesses for the beneficial enjoyment of the dominant heritage, by continuing to do something or prevent something from being done on another parcel of land (servient heritage), which does not belong to the owner of the dominant heritage. Thus, ordinarily, an easement attaches to a dominant heritage, at the cost of a servient heritage.

40. However, Section 18 which deals with customary easements stands apart as an exception to the general requirement of a dominant and a servient heritage. In other words a customary easement can exist *de hors* any benefit to dominant heritage. This is borne out by illustration (a) to Section 18. The customary easement identified in this illustration is the right of a cultivator of village land to graze his cattle on a common pasture in the village. This right of grazing is not benefitting any land owned by him; it is simply his right to take something from the common pasture.

41. The Supreme Court discussed customary easements in *State of Bihar & Ors. vs. Dalmia Jain & Co. Ltd.*, (supra) in the context of a case where the plaintiff claimed to have the right to quarry limestone for trade purposes from land that belonged to the State of Bihar. It stated that:

“...an easement being a right which is super-added to the ordinary common law incidents of the ownership of a dominant tenement, and which connotes a corresponding burden on a servient tenement, can only be created by grant or by statute. An apparent exception to this rule is a customary easement. But a customary easement is not an easement in the true sense of that expression. It is not annexed to the ownership of a dominant tenement, and it is not exercisable for the more beneficial enjoyment of the dominant tenement: it is recognised and enforced as a part of the common law of the locality where it obtains. A customary easement arises in favour of a class of persons such as residents of a locality or members of a certain community, and though not necessarily annexed to the ownership of land, it is enforceable as a right to do and continue to do something upon land or as a right to prevent and continue to prevent something being done upon land. Sanction for its enforceability being in custom, the right must satisfy all the tests which local custom for recognition by courts must satisfy.”

42. Customary easements are proved by establishing the existence of a local custom. A custom is established in the manner described above, by fulfilling the four requirements.

43. Accepting this argument, in addition to that of customary rights under the common law, the NGT in paragraph 68 of *Ramdas Janardan* (supra) held that the

Applicant therein was owed compensation.

Profits A Prendre

44. Apart from customary rights and customary easements, there is also a concept called *profits a prendre*, which was discussed at length in *State of Bihar* (supra) in paragraphs 16 to 18. It observed that:

“A profit a prendre in gross – that is a right exercisable by an indeterminate body of persons to take something from the land of others, but not for the more beneficial enjoyment of a dominant tenement – is not an easement within the meaning of the Easements Act... A claim in the nature of a profit a prendre operating in favour of an indeterminate class of persons and arising out of a local custom may be held enforceable only if it satisfies the tests of a valid custom.”

It went on to discuss how right of a profit-a-prendre must be exercised reasonably, and not in a manner which exploits the land for the purposes of trade. The Court observed that:

“A right in the nature of a profit-a-prendre in the exercise of which the residents of a locality are entitled to excavate stones for trades purposes would ex-facie be unreasonable because the exercise of such a right ordinarily tends to the complete destruction of the subject-matter of the profit.”

45. The Petitioner has annexed various documents to the Petition, by which it attempts to demonstrate that the Project Affected Fishermen have a customary right

to fish for a living in Thane Creek. We have analysed these documents in the next section of this analysis.

C. Petitioner's Material to Show Their Customary Right to Fish for a Living in Thane Creek

46. As noted above, the party seeking to prove that a custom exists will have to show that (a) the usage is ancient or from time immemorial; (b) the usage is regular and continuous; (c) the usage is certain and not varied; and (d) the usage is reasonable.

47. The Petitioners have produced the following material in support of their claim of having a valid and enforceable customary right to fish in the Thane Creek to earn a livelihood:

a. Ethnographic Survey titled 'The Tribes and Castes of Bombay' (1922) :

This document is an instructive and detailed ethnographic survey commissioned by the erstwhile Government of Bombay and published in 1922. It is titled '*The Tribes and Castes of Bombay*.' From the extract of this document it becomes clear that not only have the Koli communities inhabited the sea coast in the "Thana District," but also that the hereditary occupation of Kolis was fishing. This practice dates all the way back to 1922 or even.

b. Part IX (Maharashtra) of The Constitution (Scheduled Tribes) Order,

1950 : This is an extract of Part IX (Maharashtra) of The Constitution (Scheduled Tribes) Order, 1950. Entries 28 to 30 reflect that certain tribes of the Koli community are Scheduled Tribes.

- c. **Maharashtra Marine Fisheries Census of 2010** : An extract from this census shows the entire fisherfolk population that inhabits Thane, Vasai and Talasari.
- d. **Letter from the Commissioner of Fisheries, Government of Maharashtra dated 2 July 2012**, regarding the impact of projects along the Konkan Coast on local fishermen. In the letter, the Commissioner states that various projects are being approved without considering their impact on local fishermen in the area where the project is being carried out, and therefore an NOC of the Fisheries Department is required to be taken before the projects proceed. While the issue of requirement of NOC from the Fisheries Department is no longer in issue in this Petition, what cannot be ignored is that projects are indeed being carried out without taking local fishermen into consideration, thus prima facie recognising a customary right.
- e. **Notification of the Revenue and Forest Department issued in 2015**: Notifying a certain part of Thane Creek as a sanctuary, to be called “Thane Creek Flamengo Sanctuary,” owing to its rich floral, faunal, ecological, etc. significance. It is contended that the project area for the Thane Creek Bridge III project falls within the Eco-sensitive Zone (ESZ) of the Sanctuary.
- f. **Preliminary Report on the “Biodiversity of Thane Creek” dated February 2016**: Prepared by the Salim Ali Centre for Ornithology and Natural History (SACON). This report records the rich biodiversity that inhabits Thane Creek, and also recognizes the fish diversity (this information was in fact procured from the local fishermen during one of their fishing activities in the creek). The report specifically

states that “...*Fishery... Thane creek has also supported the livelihood of several fishing villages along its course. However several reports are indicating its decline.*”

g. 114th Minutes of MCZMA Meeting held on 2 and 3 November 2016. In

these Minutes, the proposed Thane Creek Bridge III recommended its approval to the SEIAA (State Environment Impact Assessment Agency) subject to certain condition.

One of these conditions was that “*Navigational routes of local fisherman should not be hampered.*” This is an acceptance by MCZMA that fishing is carried out in these water by local fisherman.

h. Thane Creek Flamingo Sanctuary Management Plan prepared in 2020:

The Management Plan makes various references to fishing. It states that the local fish catch are directly dependant on mangroves ecosystem; that many people rely on the creek as their primary source of income for fishing; fishing is a major source of livelihood for about 200 fisherman families; fishing occurs extensively in the Creek and navigation of boats ferrying fishermen is the only form of navigation currently taking place.

48. A combined reading of all these documents makes it clear that:

a. The Project Affected Fishermen have inhabited Thane creek and practiced fishing as their main source of livelihood for at least the last 100 years, likely more. This qualifies as an activity being practiced since *time immemorial*;

b. Various documents, as demonstrated above, have recorded from time to time that the Project Affected Fishermen have inhabited Thane creek, and practiced

fishing thereon. Therefore it is also *regular and continuous*;

c. The Project Affected Fishermen's use of the creek has uniformly been for the purpose of fishing, thereby making the usage *certain and not varied*;

d. Finally, their use for the purposes of fishing has been for their own livelihood, and not on some industrial scale which makes the exploitation of their right unreasonable. It is not even the case of Respondent No. 8 or the Respondent Nos. 1 and 2 that the activity of fishing carried out by the fisherfolk is unreasonable.

49. The documents, therefore, establish with sufficient clarity that the Project Affected Fishermen have a customary right to fish for a living in Thane creek. Most importantly, the Affidavits in Reply of Respondent No. 1 also appears to accept this position.

50. We accordingly answer Issue (i) in the affirmative.

FINDING ON ISSUE (ii) :

51. We have analyzed the submissions of the various parties. On an appreciation of the material before us, we are of the view that TCB III is likely to impact the Project Affected Fishermen's customary right to fish for a living, and therefore answer Issue (ii) in the affirmative.

52. The Court only needs to satisfy itself that there will be *some* or a likely impact. If it is so satisfied, which it is, then that is enough for us to hold that the customary rights to fish for a livelihood are being impacted. The extent of the impact may be considered in greater depth by the committee to be constituted, as discussed

later in this judgment.

53. The livelihood of fishermen is dependent on a healthy environment and balanced ecology. The Department of Environment, Forests and Wildlife of the Government of India has recognized this in the Preamble of the CRZ Notification, 2011 by stating that coastal stretches need to be protected “... *with a view to ensure livelihood security to the fisher communities...*” It requires that any development activity needs to be done in a “... *sustainable manner based on scientific principles taking into account the dangers of natural hazards in the coastal areas...*”

54. The MCZMA itself, in its 114th Minutes of Meeting dated 2 and 3 November 2016 has stated that TCB III should be constructed in a manner which does not affect the navigational routes of local fishermen. This shows that the MCZMA believes, and is aware, that navigational routes of the Project Affected Fishermen are likely to be impacted.

55. Further, Respondent Nos. 1 and 2 in a communication to various authorities of the State Government recognizes that projects implemented in the maritime area or along the sea coast would impact the livelihood of local fishermen in the proximity of the project.

56. Both of these documents show that even the State Government authorities are of the view that maritime projects like the TCB III are likely to impact the livelihood of fishermen communities in the vicinity of the project.

57. Further, we agree with the Amicus Curiae’s submission that destruction

of mangroves for TCB III will disturb the ecological balance in Thane Creek. The vital role that mangroves play in maintaining ecological balance and sustaining biodiversity is well documented. The Thane Creek Flamengo Sanctuary Management Plan and The Preliminary Report on Biodiversity of Thane Creek, which are discussed above also bear out that the destruction of mangroves often results, *inter alia*, in loss of biodiversity, and reduced fish catch, which in turn would impact livelihood of the Project Affected Fishermen. The judgment in *Bombay Environmental Action Group v. State of Maharashtra* (supra) of this Court, elucidates the importance of mangroves on the ecology. The judgment states, at paragraph 32:

“In the instant case it has been established that mangrove forests are of great ecological importance and are also ecologically sensitive.”

58. Being satisfied that there is likely to be some impact, we prefer to leave the exercise of determining the extent of the impact with more precision to a body that has the wherewithal to make such a determination.

59. Since we hold that the Project Affected Persons’ customary rights are being impacted, we also hold that they are entitled to be compensated for their loss, subject to what is stated below.

60. As of today, no state-wide compensation policy exists which provides guidance on how to constitute a committee to look into fine print of a compensation policy. Which brings us to the next issue.

FINDING ON ISSUE (iii) :

61. We are of the view that a state-wide compensation policy for communities affected by government infrastructure projects needs to be framed. The award of compensation in similar situations has been achieved by legislation, policy (specific to projects), and judicial orders. Looking to a clear trend across all of these modes of compensating affected persons and also considering the expansion of infrastructure and its impact on local communities, there must be a consideration by the executive in the State to frame a comprehensive policy for award of compensation to persons whose customary rights of occupation and livelihood are affected by infrastructure projects.

62. The Mahul Creek Extinguishment of Rights, Act, 1922, The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, and the MTHL Compensation Policy are all instances of the government being aware of the need to recognise the rights of communities that may have inhabited or used certain lands for a substantial period of time.

63. Additionally, legislation such as The Maharashtra Project Affected Persons Rehabilitation Act, 1996, The Right To Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, are examples of the government's acceptance that project affected persons ought to be rehabilitated, and social impact assessments need to be conducted when the government undertakes construction of new infrastructure.

64. Once a customary right to carry out an occupation for a means of livelihood is affected, the principles enshrined in Article 21 of the Constitution of India will be invoked. This forms the basis of the State's duty to compensate in such cases.

65. With all this in mind, we believe that such a state-wide compensation policy is required not only for fishermen compensation, but for the compensation of *any* community whose customary rights to carry out an activity for their livelihood is impacted by government infrastructure projects. We answer Issue (iii) in the affirmative.

66. By taking into consideration the suggestions made by the Amicus Curiae and the Petitioner, we recommend the following broad framework of criteria for a policy that the State Government must frame.

FACTORS AND CRITERIA FOR FORMULATING A COMPREHENSIVE COMPENSATION POLICY

A. PUBLIC PROJECTS FOR WHICH COMPENSATION SHOULD BE PAID

i. The State Government or the implementing agency (by itself or through a committee that is set out below) should at the first instance identify whether a project may have an impact on persons in the vicinity of the project (“**Project Affected Persons**”). The State Government or the committee only needs to be satisfied that there is some chance of a project impacting the Project Affected Persons at this stage.

Once it so determines, the committee should proceed to identify whether the customary rights of Project Affected Persons are being impacted.

ii. In determining whether the Project Affected Persons have a customary right (either to practice fishing in waters under the dominion and control of the State Government, or to carry out any activity on land in relation to earning a means of livelihood), the existence of such a customary right may be determined on the basis of the following criteria: (a) whether the usage has been for a substantial period of time; (b) whether the usage is regular and continuous; (c) whether the usage is certain and not varied; and (d) whether the usage is reasonable.

iii. If an application of the specific facts of that Public Project to the above criteria leads the State Government/implementing agency to the conclusion that customary rights to practice a livelihood are being impacted, the State Government or the agency implementing the Public Project should make provisions in the cost of the Public Project to compensate the Project Affected Persons. The compensation should then be paid out to the Project Affected Persons at the appropriate time.

B. APPOINTMENT OF COMPENSATION COMMITTEE

iv. Once the above determination has been made, there will be many details that need to be looked into, such as – the exact number of families in a community that need to be compensated; the type of vocation being practiced by the family/person; the type of loss being suffered; the manner of calculating quantum of compensation; the amount of compensation to be paid to each family/person; and various other such

questions. For this purpose, a committee (“**Compensation Committee**”) may be constituted comprising of:

- a. A member from the implementing agency
- b. A representative of the Project Affected Persons
- c. A representative from the office of the District Collector who exerts control over the land in question
- d. A member each from other government agencies that might be relevant to the Public Project, such as MCZMA, Revenue & Forest Department etc.
- e. A representative from an independent agency having expertise in the relevant field
- f. The representative of the project proponent should ideally not be the Chairman of the Compensation Committee, to avoid any conflict of interest.
- v. The Compensation Committee may be required to address all the questions that may arise in the compensation of Project Affected Persons. This may include, but is not restricted to:
 - a. Laying down the principles for identification of persons affected by a Public Project
 - b. Applying these principles to actually identify each family/person in the community of Affected Persons that needs to be compensated
 - c. Determining the types of vocation undertaken by the Affected Persons (for e.g., with respect to the fishermen community, the fishing activity could be

practiced commercially, or for sustenance, or as artisanal fishing)

- d. Categorizing the types of loss that have been suffered (direct/indirect, permanent/temporary, etc.)
- e. Laying down a mathematical formula for payment of compensation and attributing compensation figures to each type of loss
- f. Determining total amount payable in accordance with the aforementioned formula
- g. Ensuring that each of the Affected Person are paid the compensation owed to them in a timely manner
- h. Entertaining applications for compensation from those that claim to be affected by a project that has not been identified as a Public Project as defined above, i.e. a project which the State Government or implementing agency concludes is *not* a project affecting customary rights of a class of persons. This would include applications from parties seeking that a particular project should be classified as a Public Project as defined above

C. GUIDELINES FOR THE COMPENSATION COMMITTEE

- vi. The following paragraphs contain suggestions regarding the manner in which the Compensation Committee can determine the types of loss suffered, formula for determining the quantum of compensation etc. In making these suggestions, we have taken guidance from the approach used in determining compensation payable in the case of the Mumbai Trans Harbour Link (“**MTHL**”) and the NGT’s approach in

the JNPT port project (“**JNPT Project**”).

vii. For the Public Projects where the State Government or the implementing agency recognizes and acknowledges a customary right, the Compensation Committee will find it helpful to make the following determinations:

a. Direct impact of the Public Project on the exercise of customary rights and means of livelihood of the Affected Persons;

b. Indirect impact of the project on the exercise of customary rights and means of livelihood of the Affected Persons;

c. In relation to both, direct and indirect impact, whether the impact would be of a permanent or a temporary nature;

d. The income derived by such affected class on a per capita basis, or any other relevant basis, from the exercise of such customary right for a specified period of time;

e. If the impact is permanent and substantial, the ability or the potential of such affected persons to be rehabilitated in any other occupation or vocation for the future;

f. Looking to the factors above, a formula should be applied – which for obvious reasons can never be mathematically precise – for determining the amount of compensation to be paid to the Affected Persons;

g. The proof, documentary or by way of sworn affidavit, to be required from individuals to demonstrate that they belong to the affected class or community

of persons.

Direct Losses:

viii. Direct losses may include those losses which may impact or restrict the access to parts of land or water over which the Affected Persons exercise customary rights to earn a livelihood.

Indirect Losses:

ix. Indirect losses would be those that impact the customary rights of Affected Persons by impacting the productivity or yield generated from land or water, even if the Affected Persons continue to have physical access thereto.

x. Indirect losses include, but are not restricted to, losses of the following nature:

a. Potential ecological damage caused by the Public Project, which would detrimentally affect the customary rights of Affected Persons

b. Loss of biodiversity caused by the Public Project, which would detrimentally affect the customary rights of Affected Persons

c. Change of tidal flows or any other aspects affecting the yield from that land or water (fish catch, quality of timber in the forest etc.), which would detrimentally affect the customary rights of Affected Persons

d. Discharge of effluents, pollutants or debris which may detrimentally affect customary rights of Affected Persons

e. Potential of the Public Project to cause an influx human population, or

increase in footfall which might affect the Affected Persons' practice of their customary rights. For e.g. by loss of pasturage, forest lands, etc.

Permanent Loss:

xi. The direct or indirect loss being caused by a project may be of a permanent or a temporary nature.

xii. Every loss which is not of a temporary nature would be of a permanent nature and would be required to be compensated accordingly.

Temporary Loss:

xiii. Temporary losses might include the temporary loss of access to a portion of land or water over which such customary rights are being exercised. For example, during the construction phase of the Public Project.

xiv. Temporary losses may also include any loss caused due to ecological degradation, pollution, etc. which is of a reversible nature.

xv. Change of tidal flows and turbidity of the water during the construction phase of a Public Project may be a temporary or permanent loss depending on whether the adverse conditions are reversible or not.

Quantum of Compensation

xvi. One way of calculating the quantum of compensation would be by assigning a monetary value to each type of loss described above, determining what type of loss a family/person has suffered, and then compensating the family/person on the basis of the figure arrived at.

xvii. The manner in which this exercise was done in the MTHL Compensation Policy could be adopted or be of guidance by the Compensation Committee for a Public Project. The MTHL Compensation Policy is discussed in detail later in these recommendations.

xviii. Another approach is the one adopted by the NGT in the *Ramdas Janardhan Koli v MoEF & Ors.* (supra)

a. The NGT determined that each affected family should be compensated for loss of earnings for a period of three years.

b. For this purpose, it was assumed that each family, on average, would comprise of 4 members – two men and two women.

c. The average total earnings per family was taken to be Rs. 800/day. This was multiplied by 365 to arrive at an annual compensation figure of Rs. 2,92,000/- per year.

d. Due to “mere subsistence”, 1/3rd of this amount reduced, and the final figure per family arrived at = Rs. 1,94,666/- per year.

e. Multiplying this by 1630 families for 3 years (1,94,666 x 1630 x 3) the project proponent therein was to pay a total compensation of Rs. 95,19,20,000/-.

xix. An alternative approach to compensation may be the more scientific approach adopted in the MTHL Compensation Policy.

D. EXAMPLE OF MTHL COMPENSATION POLICY

Broad classification of fishermen into 3 categories

xx. The MTHL Compensation Policy considered compensation payable to fishermen affected by the MTHL.

xxi. A Fisherfolk Compensation Committee (FCC) was set up to monitor and take necessary actions for implementation of the MHTL Compensation Policy.

xxii. The policy, at paragraph 2.1, classified fishermen broadly into three categories:

a. Commercial: These are fishermen that reside in the Koliwadadas but do not fish in the creek. Instead, they use large trawlers to fish in the deep sea;

b. Artisanal fisher-folk: Tradition fishermen that have fished in the area for generations, but who supplement their fishing income by employing some family members in industries;

c. Subsistence fisher-folk: Daily fish catchers who generally fish by hand-picking. This is an unorganized group and should therefore be given special attention.

xxiii. This classification, as we will see, becomes relevant at the time of determining quantum of compensation payable.

Types of Loss

xxiv. Using some of the classifications of types of loss discussed above, the MTHL Compensation Policy, classified losses in terms of the following types of loss. This classification, together with the three types of fishermen, were used to calculate the amount payable as compensation. (Such an exercise can be done even for losses caused to other types of vocations, even though this example is with respect to

fishermen).

xxv. The types of loss, as observed in paragraph 1.7, were:

a. C1 – Loss of fishing and livelihood due to removal of fishing stakes and nets. This is a permanent impact, causing permanent loss.

b. C2 – Permanent decrease in revenue due to decline in fish catches and changed seawater currents in the affected area. The affected area was concluded to be the area within a radius of 500 mts from the bridge piers.

c. C3 – Loss due to restricted movement of subsistence level fisherfolk for handpicking of fishery organisms. This is a permanent impact, causing permanent loss.

d. C4 – Loss of fishing time and increased operating cost (fuel) to reach fishing grounds due to ongoing construction. Impact only considered for commercial and artisanal fisherfolk. Although temporary, this was taken to be permanent impact because of the difficulty in quantifying it on a daily basis.

e. C5 – Loss of fish due to increased turbidity during construction. This is a temporary impact, causing temporary loss.

f. C6 – Damage to fishing boats and nets due to movement of barges etc.

This will be offered only against proof of an accident.

Quantification of Compensation:

xxvi. Each of the types of loss (C1 to C6) were assigned a monetary value. For e.g., those fishermen who suffered a loss in the nature of C1, were entitled to a one-

time compensation of Rs. 5,84,000/- per unit. Loss in the nature of C2 was assessed to be 50% of the amount provided per unit for C1. And so on. A unit is a single or Dol Net.

xxvii. Ascertaining the type of loss that was suffered by a family depended on the category of fishermen that they were classified under, i.e., commercial, artisanal, or subsistence.

xxviii. The number of disbursements made per year also depended on the type of loss. For e.g., C1 loss required one payment per year. C4 required quarterly disbursement.

xxix. The final compensation matrix for the MTHL Compensation Policy was as below:

Comp Code	Nature of Impacts	Comp basic Amount	No. of PAP	Type of PAP			Compensation Amount
				Commercial	Artisanal	Subsistence	
C1	P	5,84,000	48		48		2,80,32,000
C2	P	2,92,000	34		34		99,28,000
C3	P	2,92,000	512			512	14,95,04,000
C4	T			300	175		13,00,00,000
C5	T	2,92,000 for S 5,84,000 for A			150	400	10,00,00,000
C6	I						3,00,00,000

E. CONCLUSION ON SUGGESTED POLICY

xxx. The policy framework above are only suggestions. The illustrations are to elucidate the policy considerations for policy makers to frame a rational and fair policy.

67. The discussion of the MTHL Compensation Policy has been done to illustrate how the policy framework can – and has – been implemented in an infrastructure project. It is in the same manner that it should be adopted for other projects going forward.

68. In addition to the suggested policy framework, a grievance redressal mechanism may be considered by the appropriate authorities while framing a compensation policy.

69. Although, for the present the State has not indicated that it will undertake such an exercise for framing a state-wide policy, by this Order we hereby direct Respondent No. 1 to frame such a policy. The suggestions as to the content and approach are obviously in no way binding. The purpose of including them in this Order was only to expedite and facilitate such an exercise.

FINDINGS ON ISSUE (iv)

70. Respondent No. 1, in its second Affidavit in Reply, has recommended the constitution of a committee (“**TCB Compensation Committee**”) to determine the type of loss that each of the Project Affected Fishermen will encounter as a result of

construction of TCB III, as well as the amount of compensation due to each Project Affected Fisherman. For this purpose, Respondent No. 8 has recommended which members should be made to be a part of the TCB Compensation Committee.

71. Even the Petitioner has made a similar recommendation for a committee, along with the members who the Petitioner believes should be a part of the TCB Compensation Committee.

72. In terms of the submissions made by the various parties and the Amicus Curiae, we direct that the TCB Compensation Committee should be comprised of:

- a. A representative of the implementing agency, i.e. MSRDC
- b. A representative of the Department of Fisheries
- c. A representative of the Revenue and Forest Department
- d. A member of the Police Department responsible for the area in the vicinity of Thane Creek
- e. A representative of the District Collector, Thane District
- f. A member of the National Institute of Oceanography Andheri (NIO), who would also be representing the MCZMA, since the NIO is a constituent of the MCZMA

73. The parties agreed that the representative of the MSRDC should not be made the Chairman of the TCB Compensation Committee, so as to avoid any perception of conflict of interest.

74. Even pending the state-wide policy, the TCB Compensation Committee

should determine compensation payable to Project Affected Persons, keeping in mind the principles enunciated in this Court's finding on Issue (iii).

CONCLUSION :

75. In keeping with the findings, list the above Writ Petition after six weeks for reporting compliance on i) framing state-wide policy; ii) determination of compensation by the TCB Compensation Committee to Project Affected Persons represented by the Petitioner.

76. By consent, the matter to be treated as part heard.

Before parting with this Judgment, we would like to place on record our appreciation for the valuable assistance rendered to us by the Learned Senior Counsel Shri Sharan Jagtiani (appointed as Amicus Curiae by this Court) and his legal team, more particularly, Shri Aditya Pimple, Shri Rohil Bandekar and Shri Siddharth Joshi.

(MILIND N. JADHAV, J.)

(S.J. KATHAWALLA, J.)